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### Attorney May Take a Direct Appeal from a Supreme Court Disqualification Order Since a Disqualification Proceeding Is Civil in Nature

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## DEVELOPMENTS IN THE LAW

*Attorney may take a direct appeal from a supreme court disqualification order since a disqualification proceeding is civil in nature*

In New York, appellate review of criminal proceedings is unavailable absent express statutory authority.<sup>1</sup> CPL section 450.10 grants all defendants in criminal actions the right to appeal from a judgment of conviction, at which time all intermediate orders and rulings of the trial court may be challenged for error.<sup>2</sup> Since no

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<sup>1</sup> See, e.g., *State v. King*, 36 N.Y.2d 59, 63, 324 N.E.2d 351, 354, 364 N.Y.S.2d 879, 882 (1975); *People v. Zerillo*, 200 N.Y. 443, 446-47, 93 N.E. 1108, 1109 (1911); *People v. Rediker*, 97 App. Div. 2d 928, 929, 470 N.Y.S.2d 734, 735 (3d Dep't 1983); see also A. WEBER, *HANDBOOK ON NEW YORK CRIMINAL PROCEDURE* 147 (1947) (appeal is statutory resort). Appeals were unknown at common law. G. CROSS & G. HALL, *THE ENGLISH LEGAL SYSTEM* 215-16 (1964); E. JENKS, *THE BOOK OF ENGLISH LAW* 54-55 (6th rev. ed. 1967); *People v. Kears*, 58 Misc. 2d 277, 283-84, 295 N.Y.S.2d 192, 199 (Onondaga County Ct. 1968). In New York, both the defendant and the prosecutor are authorized to take criminal appeals in certain circumstances. See CPL §§ 450.10-.20 (1983); see also N.Y. CONST. art. 6, § 4(k) (legislature may limit right of appeal from nondispositive judgments and orders to appellate divisions). It is well established that appellate review in criminal cases is neither an inherent right nor a part of constitutionally required due process of law. See, e.g., *People v. Reed*, 276 N.Y. 5, 10-11, 11 N.E.2d 330, 333 (1937); *People v. Dunn*, 157 N.Y. 528, 539, 52 N.E. 572, 575 (1899); 2 C. BROWNELL, *CRIMINAL PROCEDURE IN NEW YORK* § 54:01 (rev. ed. 1982). Nevertheless, because the right to appeal from a conviction has been granted affirmatively by the state, denial of this right is recognized as violative of due process. See *People v. Rivera*, 39 N.Y.2d 519, 522, 349 N.E.2d 825, 827, 384 N.Y.S.2d 726, 728 (1976) (indigent defendant not advised by counsel or court of right to appeal entitled to new trial); *People v. Montgomery*, 24 N.Y.2d 130, 132, 247 N.E.2d 130, 132, 299 N.Y.S.2d 156, 159 (1969) (indigent minor convicted 23 years ago without appealing may be entitled to order vacating judgment if he can prove at hearing that he was not advised of right to appeal).

<sup>2</sup> See CPL § 450.10 (1983). Section 450.10 of the CPL provides, in pertinent part:

An appeal to an intermediate appellate court may be taken as of right by the defendant from . . . [a] judgment other than one including a sentence of death

. . . .

*Id.* A defendant may appeal directly to the Court of Appeals as of right from a judgment including a sentence of death. *Id.* § 450.70(1). On appeal from a judgment of conviction, a defendant may raise for review nearly all orders and decisions made in the court below. See, e.g., *People v. Randall*, 9 N.Y.2d 413, 424, 174 N.E.2d 507, 514, 214 N.Y.S.2d 417, 426 (1961) (denial of motion to dismiss indictment, while not directly appealable, is reviewable on appeal from judgment of conviction); *People v. Walker*, 27 App. Div. 2d 755, 755, 277 N.Y.S.2d 433, 433-34 (2d Dep't 1967) (decision of trial court on *Huntley* hearing to determine voluntariness of defendant's confession not separately appealable, but can be reviewed on appeal from conviction). "[The] appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings . . . ." CPL § 470.15(1) (1983); cf. R. PITLER, *NEW YORK CRIMINAL PRACTICE UNDER THE CPL* § 14.38, at 808 (1972) (although CPL § 470.15 is new, it states a self-evident principle). Section 470.05 of the CPL sets some restrictions on the scope of appellate review by requiring the defendant to "protest" an order of the trial court in order to preserve it for review. See CPL §

statute provides for immediate appellate review of interlocutory orders issued during the pendency of a criminal action, appeals from such orders uniformly have been dismissed for lack of subject matter jurisdiction.<sup>3</sup> It has been unclear, however, whether appellate courts may entertain appeals from orders issued prior to the commencement of a criminal action, but nonetheless pertaining to an ongoing criminal investigation, since such orders are not classified as either criminal or civil.<sup>4</sup> Recently, in *Abrams v. Anony-*

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470.05(2) (1983). Appellate courts are also bound to disregard errors made by the trial court "which do not affect the substantial rights of the parties." *Id.* § 470.05 (1).

<sup>3</sup> See, e.g., *People v. Gauvreau*, 35 App. Div. 2d 741, 741, 316 N.Y.S.2d 78, 78 (2d Dep't 1970) (no direct appeal from interlocutory order denying defendant permission to inspect an exhibit); *People v. Brown*, 20 App. Div. 2d 756, 756-57, 247 N.Y.S.2d 528, 529 (4th Dep't 1964) (order denying motion for separate trials of co-defendants not directly appealable); *People v. Schectman*, 277 App. Div. 783, 783, 97 N.Y.S.2d 69, 70 (2d Dep't 1950) (order denying motion to order district attorney to preserve grand jury minutes pertaining to defendant's indictment not directly appealable). The inability to appeal directly from interlocutory orders issued in criminal proceedings is well illustrated in the case of *In re Alpert*, 15 N.Y.2d 937, 207 N.E.2d 199, 259 N.Y.S.2d 154 (1965) (mem). In *Alpert*, a doctor charged with the crime of abortion made a motion for an order to have two women examined by a physician of his choice. *Id.* at 938, 207 N.E.2d at 200, 259 N.Y.S.2d at 155-56. On appeal from the denial of his motion, the Court of Appeals dismissed the appeal as to one of the women since she was a subject of the abortion prosecution, and, thus, the appeal was from an interlocutory order in a criminal proceeding. *Id.* As to the other woman, however, no criminal proceeding was pending and, thus, the appeal could be taken under the CPLR. *Id.* at 938, 207 N.E.2d at 200, 259 N.Y.S.2d at 156.

<sup>4</sup> See *Kavanagh v. Vogt*, 88 App. Div. 2d 1049, 1049, 452 N.Y.S.2d 684, 685 (3d Dep't), *aff'd mem.*, 58 N.Y.2d 678, 444 N.E.2d 991, 458 N.Y.S.2d 527 (1982); *Blumenfeld v. Dubin*, 49 App. Div. 2d 593, 594, 371 N.Y.S.2d 133, 135 (2d Dep't 1975); *Santangelo v. People*, 49 App. Div. 2d 220, 224, 374 N.Y.S.2d 107, 111 (1st Dep't 1975), *rev'd*, 38 N.Y.2d 536, 538-39, 344 N.E.2d 404, 405, 381 N.Y.S.2d 472, 473 (1976). If a proceeding is deemed civil rather than criminal in nature, the CPLR, which provides for direct appellate review of a wide variety of interlocutory orders, will apply. See, e.g., CPLR 5701(2)(iv), (v) (1978) (appeal may be taken as of right to appellate division from order of supreme or county court that either "involves some part of the merits; or affects a substantial right"); see SIEGEL § 526, at 722 ("precious few" non-final orders cannot be appealed under CPLR).

*Kavanagh* involved an article 78 proceeding in the nature of prohibition to prevent a county judge from disqualifying the district attorney's office from prosecuting several suspects. 88 App. Div. 2d at 1049, 452 N.Y.S.2d at 684-85. The court noted that even though "there is no right of direct appeal from the order of disqualification . . . relief by way of article 78 proceeding is, nevertheless, unavailable." *Id.* at 1049, 452 N.Y.S.2d at 685. In *Blumenfeld*, however, the court held that an article 78 proceeding did not lie to prevent the enforcement of a court order that directed a suspect in a criminal investigation to shave his beard and appear in a lineup, since the order was "essentially civil in character," and thus appealable. *Blumenfeld*, 49 App. Div. 2d at 594, 371 N.Y.S.2d at 135. *But see* *People v. Vega*, 51 App. Div. 2d 33, 35 n.2, 379 N.Y.S.2d 419, 421 n.2 (2d Dep't 1976) (dictum) (different panel on same court hearing *Blumenfeld* suspect's later appeal notes that, if not bound by earlier panel's decision, it would hold that direct appeal did not lie "since in effect it is an intermediate appeal by a defendant in a criminal matter").

*mous*,<sup>5</sup> the New York Court of Appeals concluded that a proceeding brought by the attorney general to disqualify an attorney from representing individuals under criminal investigation is civil in nature, and held, therefore, that direct appeal could be taken from the supreme court's disqualification order.<sup>6</sup>

In *Abrams*, the Attorney General of New York had undertaken an investigation into fraudulent and illegal ticket sales and distribution by box office personnel of a large sports arena.<sup>7</sup> Fourteen people employed at the box office were subpoenaed to appear and testify at an inquiry conducted by the attorney general, and all fourteen retained the same attorney to represent them.<sup>8</sup> Seven of the employees were called as witnesses, but each, upon advice of the attorney, refused to answer questions on fifth amendment grounds.<sup>9</sup> Believing that the retention of the same attorney by all

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In *Santangelo*, the appellate division ruled that an appeal by a grand jury witness from an order denying his motion to compel the special prosecutor to advise him whether he had been the subject of illegal wiretaps was civil in nature, and, therefore, was appealable under the CPLR. See 49 App. Div. 2d at 224, 374 N.Y.S.2d at 111. The Court of Appeals reversed, holding that the order was not appealable because it was criminal in nature. 38 N.Y.2d at 538-39, 344 N.E.2d at 405, 381 N.Y.S.2d at 473.

<sup>5</sup> 62 N.Y.2d 183, 465 N.E.2d 1, 476 N.Y.S.2d 494 (1984).

<sup>6</sup> *Id.* at 194, 465 N.E.2d at 6, 476 N.Y.S.2d at 499.

<sup>7</sup> *Id.* at 188, 465 N.E.2d at 3, 476 N.Y.S.2d at 496. The attorney general's investigation was commenced under the authority of article 26-A of the General Business Law, which provides that the attorney general may make a private or public investigation into alleged violations of law involving theatrical financing. See N.Y. GEN. BUS. LAW art. 26-A (repealed 1983) (current version at N.Y. ARTS & CULT. AFFAIRS LAW art. 23 (McKinney 1984)). The attorney general is empowered to commence an action to enjoin violations of the laws concerning theatrical financing and to seek restitution of any money or property gained by such violations. N.Y. ARTS & CULT. AFFAIRS LAW § 23.11(1) (McKinney 1984). In addition, the attorney general may commence criminal proceedings to enforce the various penal provisions contained in the statute. See *id.* § 23.17; see also *id.* § 23.19 (misdemeanor for employee of theatrical production to retain payments unlawfully); *id.* § 23.03(5) (misdemeanor to make fraudulent statements in connection with financing of theatrical production); *id.* § 23.05(4) (misdemeanor for person subpoenaed by attorney general, under provisions of this article, to fail to testify).

The investigation in *Abrams* focused on a scheme whereby tickets would be diverted to ticket brokers in return for "ice," defined by the Court as money in excess of the face value of the tickets. See 62 N.Y.2d at 188-89, 465 N.E.2d at 1, 476 N.Y.S.2d at 496.

<sup>8</sup> 62 N.Y.2d at 189, 465 N.E.2d at 3, 476 N.Y.S.2d at 496.

<sup>9</sup> *Id.* Since the investigation was not being conducted by a grand jury, but, rather, under the authority vested in the attorney general by article 23 of the Arts & Cultural Affairs Law, the witnesses who testified did not automatically receive immunity. See N.Y. ARTS & CULT. AFFAIRS LAW § 23.15 (McKinney 1984). As authorized by the statute, *id.*, however, the attorney general granted transactional immunity to two of the seven box office employees called as witnesses, 62 N.Y.2d at 189, 465 N.E.2d at 3, 476 N.Y.S.2d at 496. Nevertheless, their subsequent testimony failed to incriminate any of the others. *Id.*

fourteen employees was interfering improperly with his investigation,<sup>10</sup> the attorney general brought an application to disqualify the attorney in Criminal Term of the Supreme Court, New York County.<sup>11</sup> Criminal Term granted the disqualification order,<sup>12</sup> and the attorney appealed to the Appellate Division, First Department, which affirmed without opinion.<sup>13</sup>

A divided Court of Appeals held that there was jurisdiction to hear the appeal because the proceeding was civil, not criminal, in nature.<sup>14</sup> Judge Jasen, writing for the majority,<sup>15</sup> confirmed the general rule that direct appeals from interlocutory orders in criminal proceedings are not available.<sup>16</sup> The Court then observed that although the proceeding appears "at first glance" to fit within the statutory definition of a "criminal proceeding,"<sup>17</sup> the proper test for characterizing a proceeding requires examination of "the true nature of the proceeding" and "the relief sought."<sup>18</sup> As to the true nature of the proceeding, Judge Jasen observed that there had been no arrests made, no criminal charges filed, no grand jury empaneled, and no criminal prosecution even threatened.<sup>19</sup> According to the Court, the only aspect of the proceeding that was criminal in nature was the attorney general's investigation, from which criminal charges might or might not result.<sup>20</sup> Judge Jasen then determined that the relief sought by the application to disqualify the attorney had "nothing inherently to do with criminal substantive

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<sup>10</sup> See 62 N.Y.2d at 196-97, 465 N.E.2d at 8, 476 N.Y.S.2d at 501. The attorney general contended that the attorney had wrongfully impeded the investigation by advising all of his clients to refuse to testify without a grant of immunity. *Id.* at 197, 465 N.E.2d at 8, 476 N.Y.S.2d at 501.

<sup>11</sup> *Id.* at 190, 465 N.E.2d at 3, 459 N.Y.S.2d at 496.

<sup>12</sup> *Abrams v. Anonymous*, 120 Misc. 2d 134, 145, 465 N.Y.S.2d 798, 804 (Sup. Ct. N.Y. County 1982).

<sup>13</sup> *Abrams v. Anonymous*, 92 App. Div. 2d 484, 459 N.Y.S.2d 342 (1st Dep't 1983). The attorney general argued before the appellate division that the court should dismiss the appeal for lack of jurisdiction, but the appellate division affirmed on the merits without discussing its authority to hear the case. See *id.*; 62 N.Y.2d at 190, 465 N.E.2d at 4, 476 N.Y.S.2d at 497.

<sup>14</sup> 62 N.Y.2d at 194, 465 N.E.2d at 6, 476 N.Y.S.2d at 499.

<sup>15</sup> Judge Jasen was joined in his opinion by Judges Jones, Wachtler, Meyer, and Kaye. Judge Simons authored a dissent in which Chief Judge Cooke joined.

<sup>16</sup> 62 N.Y.2d at 190, 465 N.E.2d at 4, 476 N.Y.S.2d at 497; see *supra* note 1 and accompanying text.

<sup>17</sup> 62 N.Y.2d at 190, 465 N.E.2d at 4, 476 N.Y.S.2d at 497.

<sup>18</sup> *Id.* at 191, 465 N.E.2d at 4, 476 N.Y.S.2d at 497.

<sup>19</sup> *Id.* at 193-94, 465 N.E.2d at 6, 476 N.Y.S.2d at 499.

<sup>20</sup> *Id.* at 193, 465 N.E.2d at 6, 476 N.Y.S.2d at 499.

or procedural law.”<sup>21</sup> Thus, having determined that it had jurisdiction over the appeal, the Court proceeded to the merits and reversed the disqualification order.<sup>22</sup>

Judge Simons dissented from the holding on the jurisdictional issue, asserting that the Court had created an unwarranted exception to the rule prohibiting interlocutory appeals in criminal proceedings.<sup>23</sup> The dissent observed that the rule against interlocutory criminal appeals was designed to eliminate excessive appellate practice and the accompanying delay in litigation, and warned that courts should refrain from creating exceptions to it without first identifying compelling policy reasons for doing so.<sup>24</sup>

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<sup>21</sup> *Id.* at 194, 465 N.E.2d at 6, 476 N.Y.S.2d at 499. The court further noted that a motion to disqualify an attorney, similar to a motion to quash a subpoena, “may arise as easily in the context of a purely civil lawsuit as in a purely criminal case.” *Id.*

<sup>22</sup> *Id.* at 200-01, 465 N.E.2d at 10, 476 N.Y.S.2d at 503. The Court was not persuaded by the contention that the attorney’s advice to his clients to remain silent unless granted immunity constituted a legal or ethical impropriety. *Id.* at 198, 465 N.E.2d at 8, 476 N.Y.S.2d at 501. The majority also found unpersuasive the attorney general’s claim that his investigation was impeded by the attorney’s tactics, as there were many investigative avenues available. *Id.*

<sup>23</sup> *Id.* at 201, 465 N.E.2d at 10, 476 N.Y.S.2d at 503 (Simons, J., dissenting). The dissent observed that the proceeding instituted by the attorney general fit squarely within the definition of a criminal proceeding contained in the CPL. *Id.* at 202, 465 N.E.2d at 11, 476 N.Y.S.2d at 504 (Simons, J., dissenting); see *supra* text accompanying note 18. In addition, Judge Simons strongly rejected the majority’s characterization of the proceeding as similar to a motion to quash a subpoena, which is recognized by caselaw as civil in nature and, thus, directly appealable. 62 N.Y.2d at 203, 465 N.E.2d at 11-12, 476 N.Y.S.2d at 504-05 (Simons, J., dissenting). An order denying a motion to quash a subpoena, or one quashing a subpoena, is directly appealable provided that the court that entered the order had both civil and criminal jurisdiction. See *Cunningham v. Nadjari*, 39 N.Y.2d 314, 317, 347 N.E.2d 915, 916, 383 N.Y.S.2d 590, 591 (1976) (per curiam). Since the motion to quash a subpoena is classified as civil in nature, see *id.*, the allowance of a direct appeal is not a true exception to the rule that interlocutory appeals cannot be taken in criminal proceedings, although it is sometimes referred to as such, see, e.g., *Abrams v. Anonymous*, 62 N.Y.2d at 203, 465 N.E.2d at 11, 476 N.Y.S.2d at 504 (Simons, J., dissenting).

<sup>24</sup> 62 N.Y.2d at 203, 465 N.E.2d at 12, 476 N.Y.S.2d at 505 (Simons, J., dissenting). Judge Simons stressed that the majority’s opinion was inconsistent with the policies underlying two of the Court’s recent decisions, *Kavanagh v. Vogt*, 58 N.Y.2d 678, 444 N.E.2d 991, 458 N.Y.S.2d 527 (1982) (mem.), and *Schumer v. Holtzman*, 60 N.Y.2d 46, 454 N.E.2d 522, 467 N.Y.S.2d 182 (1983). See 62 N.Y.2d at 203, 465 N.E.2d at 12, 476 N.Y.S.2d at 505 (Simons, J., dissenting). In *Kavanagh*, the Court held that an article 78 proceeding in the nature of prohibition does not lie to prevent the implementation of an order disqualifying the district attorney’s office from prosecuting certain cases. 58 N.Y.2d at 679, 444 N.E.2d at 992, 458 N.Y.S.2d at 528. In *Schumer*, a congressman brought an article 78 proceeding challenging a purported delegation of prosecutorial authority to Dean Trager of Brooklyn Law School by the district attorney for Kings County for the purpose of investigating improprieties in the congressman’s election campaign. 60 N.Y.2d at 49, 454 N.E.2d at 523, 467 N.Y.S.2d at 183. The congressman also sought to disqualify the district attorney from the

It is submitted that the result achieved by the *Abrams* Court on the jurisdictional issue is sound, but that the analysis employed to reach this holding is likely to cause confusion and uncertainty over whether an appeal can be taken from orders relating to criminal investigations. The decision provides for direct review of an important interlocutory order that would otherwise escape meaningful appellate review.<sup>25</sup> A disqualification order implicates both an individual's sixth amendment right to counsel and first amendment guarantee of freedom of association.<sup>26</sup> Nevertheless, if the attorney's clients had to wait until conviction to appeal an order violating these rights, it is submitted that it is unlikely that an appellate court would view the error as sufficiently prejudicial to warrant reversal. Only when a defendant's right to counsel has been denied completely, or when there has been ineffective assistance of counsel, have courts viewed the error as prejudicially contributing to the conviction.<sup>27</sup> Even if the appellate court does re-

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case. *Id.* at 54, 454 N.E.2d at 523, 467 N.Y.S.2d at 186. The Court held that an article 78 proceeding was a proper vehicle by which to challenge an alleged illegal delegation of prosecutorial authority, but also held that the same proceeding was not available to seek disqualification of the district attorney. *See id.* at 49, 454 N.E.2d at 523, 467 N.Y.S.2d at 183. Concerning the application to disqualify, the Court observed that "premature applications are not to be encouraged because they are wasteful and may be employed as delaying tactics." *Id.* at 55, 454 N.E.2d at 526, 467 N.Y.S.2d at 186.

<sup>25</sup> *See infra* notes 27-29 and accompanying text. The rule against allowing direct appeals from interlocutory orders is not designed to insulate completely determinations made by the trial court from appellate review, rather, it is intended to prevent fractured, piecemeal review of decisions. *See* CPL § 450.10, commentary at 513 (McKinney 1983); *see also* *People v. Coppa*, 45 N.Y.2d 244, 249, 380 N.E.2d 195, 198, 408 N.Y.S.2d 365, 367 (1978) (rule prevents discontinuance of ongoing trials).

<sup>26</sup> *See Abrams*, 62 N.Y.2d at 196, 465 N.E.2d at 7, 476 N.Y.S.2d at 500; *People v. Doe*, 98 Misc. 2d 805, 807, 414 N.Y.S.2d 617, 620-21 (Nassau County Ct. 1979); Gingenti, *Problems of Joint Representation of Defendants in a Criminal Case*, 54 ST. JOHN'S L. REV. 55, 55-56 & 56 n.3 (1979) (sixth amendment not only guarantees criminal defendant effective assistance of counsel but also right to attorney of own choosing).

<sup>27</sup> *See Flanagan v. United States*, 104 S. Ct. 1051, 1056 (1984) (total denial of right to counsel results in new trial without any need for showing prejudice to the defendant); *People v. Bell*, 48 N.Y.2d 933, 935, 401 N.E.2d 180, 181-82, 425 N.Y.S.2d 57, 58-59 (1979) (new trial ordered for defendant who received clearly ineffective assistance of counsel at trial); *People v. Narayan*, 76 App. Div. 2d 604, 612, 431 N.Y.S.2d 556, 561 (2d Dep't 1980) (denial of right to assistance of counsel invalidates trial). If the right to counsel has not been totally denied, or if there has not been clearly ineffective assistance of counsel, prejudice will not be presumed. *See Flanagan*, 104 S. Ct. at 1056. It is submitted that the box office employees in *Abrams* would not be able to prove the requisite prejudice necessary to win reversal of a conviction because the need for an attorney prior to the commencement of a criminal action or arrest is not as crucial as is representation at trial. If forced to raise the disqualification issue on appeal from a conviction, the parties in *Abrams* might also run afoul of CPL § 470.05, which provides: "An appellate court must determine an appeal without regard to

verse, it is suggested that the remedy of reinstatement with a new trial would not be adequate to compensate the aggrieved clients who have had to endure a criminal investigation without the services of the attorney of their choice.

While the *Abrams* Court properly recognized the need for immediate appellate review of interlocutory disqualification orders, it is submitted that an analysis classifying an application to disqualify an attorney as civil in nature is contrary both to the clear language of the CPL<sup>28</sup> and to recent holdings of the Court of Appeals.<sup>29</sup> It is further suggested that such an analysis is likely to

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technical errors or defects which do not affect the substantial rights of the parties." CPL § 470.05(1) (1984); see *People v. Gramaglia*, 71 App. Div. 2d 441, 445, 423 N.Y.S.2d 78, 80 (4th Dep't 1979) ("defendant is entitled to fair trial, not a perfect one"). In the case of an error not reaching constitutional dimensions, the test for "harmless error" is whether "there is a significant probability, rather than only a rational possibility, in the particular case that the jury would have acquitted the defendant had it not been for the error or errors which occurred." *People v. Crimmins*, 36 N.Y.2d 230, 242, 326 N.E.2d 787, 794, 367 N.Y.S.2d 213, 222 (1975). If the error is of constitutional proportions, however, the test is less stringent: the error is harmless only if "there is no reasonable possibility that the error might have contributed to defendant's conviction and that it was thus harmless beyond a reasonable doubt." *Crimmins*, 36 N.Y.2d at 237, 326 N.E.2d at 792, 367 N.Y.S.2d at 218. With respect to disqualification orders entered prior to the commencement of a criminal action, even assuming application of the lower barrier of the constitutional harmless error rule, it is submitted that the error would be deemed harmless because of its remoteness to the conviction.

<sup>28</sup> See 62 N.Y.2d at 201-02, 465 N.E.2d at 10-11, 476 N.Y.S.2d at 503-04 (Simons, J., dissenting). Under the CPL, a criminal proceeding is defined as:

any proceeding which (a) constitutes a part of a criminal action or (b) occurs in a criminal court and is related to a prospective, pending or completed criminal action, either of this state or of any other jurisdiction, or involves a criminal investigation.

CPL § 1.20(18) (1981). The Court explicitly acknowledged that the investigation in *Abrams* was criminal in nature. 62 N.Y.2d at 195, 465 N.E.2d at 7, 476 N.Y.S.2d at 500. As the dissent noted, the prospective criminal action arose out of a criminal investigation. *Id.* at 202, 465 N.E.2d at 10-11, 476 N.Y.S.2d at 503-04 (Simons, J., dissenting). Nor was there any question that the application was made in a criminal court. *Id.* at 202, 465 N.E.2d at 11, 476 N.Y.S.2d at 504 (Simons, J., dissenting). The Court never attempted to show that the proceeding did not fit within the definition of a criminal proceeding contained in the CPL, but rather insisted that the proper test for determining the nature of a case required a determination of the true nature of the proceeding and the relief sought. See *id.* at 191-94, 465 N.E.2d at 4-6, 476 N.Y.S.2d at 497-99; *supra* note 18 and accompanying text.

<sup>29</sup> See *Alphonso C. v. Morgenthau*, 38 N.Y.2d 923, 924-25, 346 N.E.2d 819, 819, 382 N.Y.S.2d 980, 981 (1976) (per curiam). *Alphonso C.* was a consolidation of two appeals. In one case, *Alphonso C.*, the supreme court had granted an order on application of the district attorney that directed the appellant to appear in a lineup. *Id.* at 924, 346 N.E.2d at 819, 382 N.Y.S.2d at 981. In the other, *Angelo G.*, an order had issued under similar circumstances directing several suspects to provide a handwriting example to the district attorney. *Id.* In both cases, no criminal action had been commenced against the appellants, and no grand jury was investigating them. *Id.* The orders were sought merely as an aid in the district attorney's investigation of certain crimes. *Id.* The Court of Appeals dismissed the appeals



frustrate the policies underlying the rule prohibiting direct appellate review of interlocutory criminal orders<sup>30</sup> and lead to increased attempts to appeal such orders on the theory that the proceeding is civil rather than criminal in nature.<sup>31</sup> Therefore, the Court should discontinue use of the legal fiction employed in *Abrams* and instead should classify the holding of the case as a legitimate exception to the rule that interlocutory orders in criminal proceedings may not be directly appealed.

*Bernard D'Orazio*

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taken in both cases on the ground that the orders were granted in criminal proceedings, as defined in the CPL, and, therefore, were not directly appealable. *Id.* at 925, 345 N.E.2d at 819, 382 N.Y.S.2d at 981. It is submitted that the decisions of the Court in *Alphonso C. and Abrams v. Anonymous* are in direct conflict and cannot be reconciled.

<sup>30</sup> See H. UVILLER, *THE PROCESSES OF CRIMINAL JUSTICE: INVESTIGATION AND ADJUDICATION* 1264 (2d ed. 1979). If interlocutory appeals were permitted in criminal actions, litigation would be "compounded unduly by protracted and multifarious appeals and collateral proceedings frustrating the speedy determination of disputes . . . , [rendering a] speedy trial a legal impossibility." *State v. King*, 36 N.Y.2d 59, 63-64, 324 N.E.2d 351, 354-55, 364 N.Y.S.2d 879, 882-83 (1975); see also *Lauter, Justices to Hear Attorney Disqualification Case*, Nat'l L.J., Oct. 29, 1984, at 5, col. 1. New York courts have consistently observed that the main purpose of the rule prohibiting interlocutory appeals is to prevent delay in bringing offenders to trial and judgment. See, e.g., *People v. Coppa*, 45 N.Y.2d 244, 249, 380 N.E.2d 195, 198, 408 N.Y.S.2d 365, 367 (1978).

<sup>31</sup> For example, there appears to be no reason why suspects in criminal investigations who are ordered by a court on application of the district attorney to submit to the taking of samples of hair or blood, or for photographs of their teeth or jaw, could not use the *Abrams* rationale to secure direct appellate review of their claims. It is submitted that cases of this nature do not merit direct appellate review in that the nature of the rights violated is such as can effectively be remedied on appeal from conviction through the grant of a new trial and the suppression of the wrongfully obtained evidence. It is when the nature of the wrong cannot later be remedied, as, it is submitted, in a case of a disqualification of a suspect's attorney, that the court should allow a direct appeal as an exception to the general rule.